UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRANT IMPORTING & DISTRIBUTING CO., INC.; HAYES BEER DISTRIBUTING COMPANY; L&V DISTRIBUTORS, INC.; CHICAGO BEVERAGE SYSTEMS LLC; JOSEPH MULLARKEY DISTRIBUTORS, INC; TOWN & COUNTRY DISTRIBUTORS, INC.; KOZOL BROS., INC.; FRED W. LOSCH BEVERAGE CO.; and SCHAMBERGER BROS. INC.,	No. 08 CV 1269
Plaintiffs,	The Honorable Joan H. Lefkow
v.	
AMTEC INTERNATIONAL OF NY CORP., Individually and d/b/a EUROPEAN BEER IMPORTERS, INC.; and ADVANCED BRANDS & IMPORTING CO., INC., d/b/a STAR BRANDS IMPORTS,	
Defendants.	

AMTEC INTERNATIONAL OF NY CORP.'S RESPONSE
TO PLAINTIFFS' SUPPLEMENTAL MOTION TO REMAND

NOW COMES Defendant Amtec International of NY Corp. ("Amtec"), by and through its attorneys Ettelman & Hochheiser, and in response to the supplemental motion to remand filed by Plaintiffs, states as follows:

INTRODUCTION

This case is a classic example of a plaintiff attempting to forum shop by fraudulently joining non-diverse parties. Plaintiffs are all Illinois corporations doing business in Illinois, except for Chicago Beverage Systems LLC ("Chicago Beverage"), whose domicile is unknown.[1] Prior to this case being removed to federal court,

[1] Chicago Beverage is a LLC whose sole member is Reyes Holdings LLC. Plaintiffs have not disclosed the members of Reyes Holdings LLC.

Plaintiffs' only claims were against Amtec, a New York corporation with its principal place of business in New York. Although Plaintiffs originally named Advanced Brands & Importing Co., Inc ("Advanced"), a Delaware corporation with its principal place of business in New York, as a defendant, it failed to assert any actual claims against it. Now that the case has been removed, Plaintiffs assert for the first time that both Advanced and European Beer Importers Inc. ("European"), an Illinois corporation, are subject to liability pursuant to the Illinois Beer Industry Fair Dealing Act (820 ILCS 720/1 et seq.) ("IBIFDA"). Plaintiffs also allege unjust enrichment and misappropriation claims, which they assert are derived from IBIFDA's purported grant of "exclusive distribution rights." Plaintiffs do not assert any breach of contract claims.

Notably, the factual basis for Plaintiffs' claims against Advanced and European are directly contradicted by the documents Plaintiffs attached to the Amended Complaint. These documents establish the following:

First, Advanced voluntarily relinquished its import rights for Zywiec brand beer to the brewer Grupa Zywiec S.A. on December 12, 2007, after the expiration of the parties' import agreement. (*See* Exhibit D to the Amended Complaint)[2] Thus, it is inconceivable that Plaintiffs can now assert that Advanced wrongfully terminated their distribution rights when Advanced is no longer the importer and has no authority over the brand.

Second, on January 24, 2008, Grupa Zywiec S.A. appointed Amtec as the sole importer of Zywiec. (*See* Exhibit B to the Amended Complaint) Because Amtec did not purchase its import rights directly from Advanced, Amtec cannot be deemed a "successor brewer" under IBIFDA, has no privity with Plaintiffs, and is under no obligation to

[2] The Amended Complaint and its exhibits are attached as Exhibit 1 to this Response.

appoint Plaintiffs as its distributors. Even more importantly though, it is outrageous for Plaintiffs to assert that European is the importer, when clearly the attached documents demonstrate it has no such rights and Amtec is the "sole importer." In fact, on January 25, 2008, Amtec appointed European as its distributor. (*See* Exhibit C to the Amended Complaint) Thus, because European is merely a distributor and not an importer, any claims that it terminated Plaintiffs' distribution rights are frivolous.

Therefore, as will be demonstrated below, claims against Advanced and European are frivolous and there exists no "reasonable possibility that a state court would rule against the [in-state] defendant." For these reasons, the Court must find that Advanced and European have been fraudulently joined and deny Plaintiffs' motion to remand.

ARGUMENT

I. STANDARD FOR FRAUDULENT JOINDER

"Parties fraudulently joined should be disregarded in determining diversity jurisdiction." *Nagy v. Berkshire Life Ins. Co. of America*, No. 03 C 2219, 2003 WL 22388911, at *2 (N.D. Ill. Oct. 20, 2003). "[J]oinder is considered fraudulent, and is therefore disregarded, if the out-of-state defendant can show there exists no 'reasonable possibility that a state court would rule against the [in-state] defendant.'" *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999). Further, "[A]lthough false allegations of jurisdictional fact may make joinder fraudulent, in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives." *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992) (internal citations omitted). "An out-of-state defendant seeking to establish federal jurisdiction based on fraudulent joinder of a non-diverse defendant bears the heavy burden of proving that, 'after resolving all issues of fact *and* *law* in favor of plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant.'" *Nagy*, 2003 WL 22388911, at *2, *quoting Poulos, 959 F.2d at 73* (emphasis in original).

II. FORUM SHOPPING

Plaintiffs' sole purpose in joining Advanced and European is to defeat diversity and have their claims adjudicated by the Circuit Court of Cook County rather than by this Honorable Court. Plaintiffs' pretextual motivation to forum shop is most evident by the fact that prior to this case being removed, Plaintiffs sought an emergency motion for a temporary restraining order in the Circuit Court. However, in the two months this case has been pending before this Court, Plaintiffs have not sought a similar restraining order even though they previously asserted a purported emergency. Rather, Plaintiffs have sought to amend their previously defective complaint and have the action remanded back to state court, where they will once again assert an emergency. *See* Amended Complaint, ¶ 49. If Plaintiffs were not attempting to forum shop, they could have sought a temporary restraining order in this Court at the same time they sought to amend their Complaint.

III. THE CITIZENSHIP OF CHICAGO BEVERAGE IS UNKNOWN

One of the main pillars of Plaintiffs' argument is its recent discovery that Chicago Beverage is actually a citizen of Delaware and that diversity does not exist because Advanced is also a citizen of Delaware. Initially, Plaintiffs asserted in their original Complaint that Chicago Beverage was an Illinois limited liability company domiciled in Chicago, Illinois. As it turned out, Chicago Beverage is in fact a Delaware limited liability company located in Chicago and its sole member is Reyes Holdings LLC ("Reyes Holdings"), also a Delaware limited liability company located in Chicago. However, just because Chicago Beverage is a Delaware limited liability company and its sole member is also a Delaware limited liability does not necessarily mean that Chicago Beverage is domiciled in Delaware. Rather, the citizenship of an LLC for purposes of the diversity jurisdiction is the citizenship of its members. *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). Thus, Plaintiffs' assertion that Chicago Beverage is a citizen of Delaware merely because Reyes Holdings is a Delaware limited liability company is wrong. Instead, Chicago Beverage is a citizen of the states where the members of Reyes Holdings are domiciled. Since Plaintiffs have not disclosed the citizenship of the members of Reyes Holdings, the domicile of Chicago Beverage is unknown.

IV. EUROPEAN IS NOT A SUCCESSOR BREWER

The addition of European as a party to this suit is frivolous because European is not a "successor brewer" under IBIFDA and thus is not subject to liability. IBIFDA requires that to qualify as a "successor brewer" an importer must acquire his import rights directly from the previous importer by "merger, purchase of corporate shares, purchase of assets, or any other arrangement." 815 ILCS § 720/1.1(6). Surprisingly, Plaintiffs attach the appointment letter from Grupa Zywiec S.A. naming Amtec as the "sole importer and agent for the brands into Illinois." (*See* Exhibit B to the Amended Complaint). "It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998).

Further, even if European was an importer of Zywiec, it would still not be a "successor brewer" because any import rights it may have acquired were not by "merger, purchase of corporate shares, purchase of assets, or any other arrangement." *See also Joseph Triner Corp. v. Champale, Inc.*, No. 87 C 2980, 1987 WL 18369, at *2 (N.D. Ill.

Oct. 2, 1987) ("The Act requires the brewer to be in some relationship to the wholesaler-either as a direct party to the contract or as a third party who, as assignee, has become a party to the agreement."); *Shestokas Distributing, Inc. v. Hornell Brewing Co. Inc.*, No. 91 C 3985, 1993 WL 39696 (N.D. Ill. Feb. 16, 1993), *aff'd* No. 93-1537, 1993 WL 52217 (7th Cir. Dec. 16, 1993) (holding that where the exclusive rights to manufacture a brand of beer were relinquished by a manufacturer and sold to a subsequent manufacturer, the subsequent manufacturer was not a "successor brewer" pursuant to IBIFDA and could lawfully appoint a distributor of its own choosing).

The attachments to Plaintiffs' Amended Complaint, namely exhibits B through D, disprove that European acquired any import rights from Advanced sufficient to qualify as a "successor brewer." Rather, on December 12, 2007, Grupa Zywiec S.A. informed Advanced, with Advanced's voluntary consent and relinquishment, that pursuant to the parties March 7, 2005, Agreement, which expired in March 2007, Advanced would no longer be the importer of Zywiec beer in Illinois after December 31, 2007. (*See* Exhibit D to the Amended Complaint). Thereafter, on January 24, 2008, following the termination of Advanced as importer of Zywiec brands in Illinois, Amtec was appointed by the Brewer as the sole importer in Illinois (*See* Exhibit B to the Amended Complaint). Subsequently, on January 25, 2008, Amtec appointed European as sole distributor of Zywiec brands in Illinois. (*See* Exhibit C to the Amended Complaint).

Therefore, because European is not an importer of Zywiec brand beer in Illinois, and because any purported import rights that European may have were not acquired from Advanced, but directly from the brewer itself, European is not a successor brewer under IBIFDA and cannot be subject to liability pursuant to the Act.

V. ADVANCED IS NOT LIABLE PURSUANT TO IBIFDA BECAUSE IT IS NO LONGER THE IMPORTER OF ZYWIEC

The inclusion of Advanced as a defendant in this action is without any basis in law or fact. In particular, the facts are clear that Advanced is no longer the importer of Zywiec and that it voluntarily relinquished those rights following the expiration of its import agreement with Grupa Zywiec S.A. (*See* Exhibit D to the Amended Complaint). Thus, Advanced could not and did not terminate Plaintiffs' so called distribution rights precisely because it has no authority to do so. Rather, as described above, Plaintiffs' distribution rights expired when Amtec acquired its import rights directly from the brewer. Further, pursuant to *Joseph Triner* and *Shestokas Distributing,* Amtec had the right to appoint a distributor of its choosing and such appointment was not a violation of IBIFDA; in this case it appointed European. Tellingly, while Advanced may be subject to a breach of contract claim (depending on the language of any such contract) instead of liability pursuant to IBIFDA, Plaintiffs have not alleged the existence of any such contract and are not seeking liability based on a breach of contract theory. However, irrespective of any conceivable breach of contract theory, Advanced cannot be held liable for Plaintiffs' loss of distribution rights pursuant to IBIFDA, and thus, Plaintiffs' claims against Advanced constitute fraudulent joinder.

VI. IBIFDA PREEMPTS PLAINTIFFS' COMMON LAW THEORIES OF RECOVERY

The relationship between a brewer and a wholesaler is strictly and entirely governed by Statute. 815 ILCS 720/2(B) ("This Act . . .shall govern all relations between brewers and their wholesalers. . . ."); *see also* ¶ 2 of the Amended Complaint. In this regard, the Statute is clear that an importer that acquires its import rights by a method other than "merger, purchase of corporate shares, purchase of assets, or any other

F:\Amtech\Response Supp Motion to Remand.doc arrangement," has the right to appoint a distributor of its own choosing. Thus, as described above, any claim against European and Advanced pursuant to IBIFDA is frivolous. However, even if IBIFDA did not permit a brewer to select its own distributor (as clearly it does here), the Act provides a remedial system of reasonable compensation for the aggrieved distributor. In particular, the Act provides that a wrongfully terminated distributor is entitled to the "fair market value" of its business, including any good will associated with the brand. 815 ILCS 720/2 (B).

In this regard, Plaintiffs' common law theories of misappropriation, unjust enrichment, and breach of covenant of good faith and fair dealing, are improper and frivolous because they are directly derived from and reliant on Plaintiffs' so called "exclusive rights of distribution" as provided for by IBIFDA. (*See* Amended Complaint, Count IV, ¶ 50 ("By terminating or cancelling Plaintiffs' exclusive distribution rights. . . ."), and Count VI, ¶ 48 ("[i]n effect creating the market for Zywiec Beer, has made Plaintiffs' intellectual property rights – consisting of the distribution rights to Zywiec . . ."). Thus, because Plaintiffs' common law claims are directly derived from and reliant on their alleged rights pursuant to IBIFDA, these claims constitute an impermissible expansion of a statutory remedy. *See Morris v. Ameritech Illinois*, 337 Ill. App. 3d 40, 49, 785 N.E.2d 62, 69 (1st Dist.2003) (Once "the legislature has provided a remedy on a subject matter[,] we are not only loath but in addition harbor serious doubts as to the desirability and wisdom of implementing or expanding the legislative remedy by judicial decree.") (internal citations omitted); *Nickels v. Burnett*, 343 Ill. App. 3d 654, 661, 798 N.E.2d 817, 824 (2nd Dist. 2003) ("In order to preempt the field, the legislature is required either to state clearly its intention to do so or to create a new statutory remedy in an area already otherwise controlled by the common law.").

Therefore, because IBIFDA governs all relations between a brewer and a wholesaler and provides a specific remedy for any breach, and because Plaintiffs' common law claims are derived from and reliant on IBIFDA, Plaintiffs' common law claims are defective and frivolous.

VII. PLAINTIFFS FAIL TO PROPERLY PLEAD UNJUST ENRICHMENT AND MISAPPROPRIATION

Plaintiffs allege that European and Advanced have been unjustly enriched because each has "attempted" to misappropriate the good will and intellectual property belonging to Plaintiffs.[3] However,

> Because unjust enrichment is based on an implied contract, "where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application." *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 497, 607 N.E.2d 165, 177 (1992).

Thus, Plaintiffs' allegations of unjust enrichment are in direct conflict with its allegations that it has valid and enforceable agreements with Advanced, and that Amtec and European are the successors of those agreements. While Plaintiffs' are permitted to plead these two separate claims in the alternative, they have chosen not to do so, instead counts IV and VI (unjust enrichment and misappropriation) repeat and reallege these prior agreement based allegations. In *Purizer Corp. v. Battelle Memorial Institute*, No. 01 C 6360, 2002 WL 22014, *5 (N.D. Ill. Jan. 7, 2002), the court dismissed plaintiff's claims of unjust enrichment, ruling that because it incorporated its contractual assertions by reference it was a defective pleading. In so doing, the court stated the following:

> However, defendant further argues that the form of the

[3] Because Illinois is a fact-pleading State, Plaintiffs vague allegations about "good will" and "intellectual property," are insufficient to state a cause of action if this case is remanded to the Circuit Court. *See People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008 (1981).

> complaint does not comport with alternative pleading requirements, noting that the unjust enrichment count incorporates by reference paragraphs alleging the existence of contracts. Other courts in this district have taken a similar view of the technical requirement of Rule 8(e)(2). *See, e.g., Samuels v. Old Kent Bank*, 1997 WL 458434, at *14-15 (N.D.Ill.1997); *Allied Vision Group, Inc. v. RLI Prof'l Techs., Inc.*, 916 F.Supp. 778, 782 (N.D.Ill.1996). While a plaintiff need not use particular words to plead in the alternative, it must use a formulation from which it can be reasonably inferred that this is what it is doing. *Holman v. Indiana*, 211 F.3d 399, 407 (7th Cir.), *cert. denied*, 531 U .S. 880 (2000). The court agrees that if plaintiff intended to plead its unjust enrichment claim as an alternative theory to its breach of contract claim, it has not been sufficiently clear in its method. Accordingly, Count IV is dismissed without prejudice. *Purizer*, 2002 WL 22014, at *5.

Therefore, because Plaintiffs have failed to plead unjust enrichment in the alternative, those counts against European and Advanced are frivolous and subject to dismissal.

CONCLUSION

WHEREFORE, Defendant Amtec International of NY Corp. respectfully requests that this Honorable Court deny Plaintiffs' supplemental motion to remand for the aforementioned reasons.

Dated: Garden City, New York
April 17, 2008

ETTELMAN & HOCHHEISER, P.C.

By:___s/ [Joshua S. Stern]_____

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2008, I electronically filed the foregoing Response with the Clerk of the Court using CM/ECF system which will send notification of such filing to all attorneys of record.

ETTELMAN & HOCHHEISER, P.C.

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